

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT E. WRIGHT
Claimant

VS.

U.S.D. NO. 259
Respondent
Self-Insured

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Docket No. 159,556

ORDER

Both parties request review of the Award entered by Special Administrative Law Judge William F. Morrissey dated February 1, 1995. The Appeals Board heard oral argument on July 6, 1995.

APPEARANCES

Claimant appeared by his attorney, Kelly W. Johnston of Wichita, Kansas. The respondent, a self-insured, appeared by its attorney, Larry Shoaf of Wichita, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, at oral argument the parties agreed the average weekly wage would be \$573.69 and there would be timely written claim and notice of May 23, 1991 was found to be the date of last injurious exposure and date of disablement.

ISSUES

The Special Administrative Law Judge found claimant had proven an occupational disease and awarded claimant permanent partial disability benefits based upon a 15 percent functional impairment rating. Respondent requests review of the issues of:

- (1) Whether claimant sustained disablement from an occupational disease compensable under the Kansas Workers Compensation Act.
- (2) If May 23, 1991 was not the date of last injurious exposure, whether timely written claim was made.
- (3) If May 23, 1991 was not the date of disablement, whether timely notice was given.
- (4) Nature and extent of claimant's disablement.
- (5) Claimant's entitlement to past and future medical benefits.
- (6) Average weekly wage.

Claimant also requests the Appeals Board to review the issues of nature and extent of disability and claimant's entitlement to medical benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The Award of the Special Administrative Law Judge should be modified to award claimant ongoing medical benefits.

Claimant contends he suffers from an asbestos related pleural disease and, therefore, is entitled to receive workers compensation benefits from the respondent because he experienced his last injurious exposure to asbestos while working for the respondent between May 1, 1986 and May 23, 1991. Respondent contends that claimant did not experience an "injurious exposure" to asbestos during the period alleged and, therefore, claimant is not entitled to benefits for an occupational disease under the Workers Compensation Act.

Occupational diseases are treated as injuries by accident under the Kansas Workers Compensation Act. K.S.A. 44-5a01 provides in part:

“(a) Where the employer and employee or workman are subject by law or election to the provisions of the workmen's compensation act, the disablement or death of an employee or workman resulting from an occupational disease as defined in this section shall be treated as the happening of an injury by accident, and the employee or workman or, in case of death, his dependents shall be entitled to compensation for such disablement or death resulting from an occupational disease, in accordance with the provisions of the workmen's compensation act as in cases of injuries by accident which are compensable thereunder, except as specifically provided otherwise for occupational diseases.”

Further, K.S.A. 44-5a06 provides that the date when a worker becomes incapacitated from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease shall be utilized as the date of injury equivalent to the date of accident under the Workers Compensation Act. The same statute also provides that the last employer in whose employment the worker is last injuriously exposed to the hazards of the disease is liable to the worker for the occupational disease and does not have the right to seek contribution from other employers.

Because claimant suffers from asbestosis, which is caused by the inhalation of asbestos fiber, it is clear from the above statutes that the claimant must prove that he experienced an injurious exposure to asbestos fiber while working for the respondent.

Claimant testified that he served 22½ years in the U.S. Navy and during that time was exposed to asbestos when shipyard workers repaired the ships on which claimant was stationed. Claimant also testified that after he left the Navy in October 1971 he was exposed to asbestos while working for the Long Beach Unified School District as a plumber during the period 1971 through March 1982.

Claimant started working for the respondent in late March 1982 as a plumber. After approximately four years claimant was promoted to lead man in the plumbing shop and in February 1989 was promoted to a plumbing shop supervisor. In 1985 claimant learned he was working around materials containing asbestos and in 1986 was provided training relating to that material. Claimant testified asbestos was in the insulation surrounding water pipes, in ceiling plaster, in tunnels and in boiler rooms. Claimant occasionally stripped asbestos off old pipes or tore out ceilings to make repairs. Claimant testified there were times when he would work eight hours in a tunnel where insulation containing asbestos had fallen from the pipes to the floor. Between 1982 and 1986, claimant performed this work without breathing protection apparatus other than dust masks that a fellow employee happened to find. After 1986 claimant used a respirator that significantly decreased any asbestos fiber that he would inhale. Claimant testified that in his opinion he was exposed to asbestos while working for the respondent to a much greater extent than when he worked for the Long Beach School District.

In May 1991 respondent discovered x-rays that had been taken and sent to the school district in 1988 that indicated claimant had radiological findings consistent with asbestosis. Upon discovery of that information, the respondent immediately restricted claimant from working around asbestos or working in environments that could possibly expose him to airborne asbestos fiber. Claimant has obeyed that restriction and continues to work for the respondent.

Claimant presented the testimony of Ralph M. Keller, an industrial hygienist, who testified he believes claimant was occasionally exposed to airborne asbestos fiber which exceeded safe exposure levels while working for the respondent between 1982 and 1986. After 1986 he believes claimant's asbestos exposure would probably not have exceeded OSHA standards. Respondent presented the testimony of another industrial hygienist, J. Thomas Pierce, Ph.D., who testified he was unable to reach a conclusion whether claimant

had heavy or significant exposure to asbestos while working for the respondent based upon the information provided him.

Stephen M. Polland, D.O., who is board certified in both pulmonology and pulmonary disease, testified that he first saw claimant in September 1991. Because of x-ray findings and pulmonary function tests which demonstrated minimum obstructive and mild restrictive lung disease, the doctor found that claimant had asbestosis. The doctor saw claimant for a second and final visit in March 1992 for a follow-up evaluation. His final diagnosis remained asbestosis.

Although claimant's prognosis is not absolute, Dr. Polland testified the disease is generally progressive and can take on two forms-one is a lung fibrosis or restrictive-type pattern, and the other is carcinoma of the lung or pleural surface. He also testified that claimant's complaints of increasing shortness of breath is consistent with the progression of asbestosis. Because of the disease, Dr. Polland recommended that claimant avoid passive cigarette smoke, that he take prophylactic medications such as influenza vaccine and pneumococcal vaccines, and that he obtain yearly evaluations including a chest x-ray and pulmonary function studies to monitor the disease's progression.

Dr. Polland also testified claimant's asbestosis was contributed to by the asbestos exposure and the asbestos fiber claimant inhaled while working for the respondent and believes claimant has a 25 percent functional impairment due to the lung disease.

Respondent presented the testimony of Thomas J. Bloxham, M.D., who is board certified in internal medicine, pulmonary diseases and sleep disorders. He examined claimant in June 1994 and found mild obstruction of air flow out of the lung, normal lung capacity and normal diffusing capacity. Because it is generally thought to take 20 to 30 years for the lungs to demonstrate some of the changes shown by claimant's x-rays, Dr. Bloxham does not feel that claimant's lung disease is the result of asbestos exposure while working for the respondent. Although Dr. Bloxham agrees with Dr. Polland that asbestosis may show up on x-rays as diaphragmatic calcification within four to six years of exposure, Dr. Bloxham believes it is unlikely in this case. Based upon pulmonary function studies, Dr. Bloxham believes claimant has a 10 percent functional impairment. As indicated in his letter dated July 15, 1994, the doctor believes claimant's lung problems are most likely due to claimant's service in the Navy with, perhaps, some contribution from his work for both the Long Beach School District and respondent. A close review of his testimony indicates that Dr. Bloxham predicates this opinion upon his belief that claimant's exposure to asbestos while working for the respondent was minimal.

Because of the divergence in the functional impairment ratings, the Administrative Law Judge originally assigned to this proceeding selected and appointed Ernest R. Schlachter, M.D., to evaluate claimant and provide his opinion regarding functional impairment. Dr. Schlachter saw claimant in September 1994 and diagnosed asbestosis with reduced pulmonary function, hypertensive cardiovascular disease with episodes of congestive heart failure, and diabetes mellitus. Dr. Schlachter believes claimant's complaints of dyspnea, or shortness of breath, are actually related to claimant's

cardiovascular problems rather than his lung disease. Although the doctor believes the pulmonary disease may affect claimant's endurance, he does not see any need to place restrictions upon claimant at this time. Using the AMA Guides, as did both Drs. Polland and Bloxham, Dr. Schlachter believes claimant has a 15 percent permanent partial functional impairment based upon the results of the pulmonary function studies.

Based upon the above evidence, the Special Administrative Law Judge awarded claimant permanent partial disability benefits based upon Dr. Schlachter's 15 percent functional rating. The Appeals Board agrees with that finding. Respondent's argument that claimant may not receive permanent partial disability benefits based upon a functional impairment rating for an occupational disease is not well founded. See Hill v. General Motors Corporation, 214 Kan. 279, 519 P.2d 608 (1974), where claimant was awarded permanent partial disability benefits for an occupational disease based upon a 7½ percent functional rating and the Kansas Supreme Court approved that award.

Based upon the language of K.S.A. 44-5a01, which is quoted above, the Appeals Board finds the occupational disease statutes supplement the provisions of the Workers Compensation Act regarding injuries from accident. Therefore, permanent partial disability benefits are to be awarded for occupational disease similar to injuries by accident, except as specifically provided otherwise. Therefore, claimant is entitled to receive permanent partial disability benefits based upon his functional impairment rating.

Based upon the evidence presented, the Appeals Board finds that claimant was exposed to asbestos fiber and the risk of acquiring asbestosis during his military service and later as a plumber for both the Long Beach School District and the respondent. The Appeals Board finds that claimant is entitled compensation for his lung disease as an occupational disease because claimant's employment with the respondent created a peculiar hazard of acquiring asbestosis.

The Appeals Board finds claimant, on occasion, was exposed to significant amounts of asbestos fiber from 1982 through 1985 and minimally exposed to the substance after 1986 through May 1991, the period he was using a respirator. The Appeals Board finds this continued exposure to asbestos sufficient under the Kansas Workers Compensation Act to make the respondent liable for this occupational disease. As provided by K.S.A. 44-5a06, where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease shall be liable without the right to contribution from any prior employer.

The Appeals Board finds claimant has suffered disablement as a result of his exposure to asbestos while working for the respondent and the disablement occurred within one year of his last injurious exposure in May 1991. The Appeals Board rejects respondent's contention that an individual cannot have an injurious exposure unless the exposure exceeds the acceptable level of risk as determined by some governmental agency.

The Appeals Board finds claimant's disablement is his occupational and medical restriction limiting him from working in environments containing friable asbestos. Although the physicians who testified admit they cannot specifically pinpoint the date or year the asbestos fibers lodged in claimant's lungs and began working their way through the lung tissue to cause the condition that was ultimately shown on the 1988 x-rays, both Drs. Bloxham and Polland indicate that claimant's exposure to asbestos while working for the respondent contributed to the disease process.

Under the last injurious exposure rule which has been adopted by the Kansas Legislature in occupational disease cases as reflected by K.S.A. 44-5a06, the responsibility for a worker's occupational disease is placed upon the employer who last created the risk of the worker's contraction of the disease by exposing him to the substance which caused the disease. See Tomlinson v. Owens-Corning Fiberglas Corp., 244 Kan. 506, 770 P.2d 833 (1989). Under the facts presented in this proceeding, the party responsible to claimant is the respondent.

The Appeals Board finds claimant is entitled to ongoing and future medical benefits consisting of prophylactic medications and periodic medical checkups and related medical procedures. Claimant may apply to the Director for additional future medical benefits beyond the prophylactic medications and periodic checkups should the need arise.

Based upon the above findings and the stipulations of the parties at oral argument, the Appeals Board finds claimant's average weekly wage for purposes of this Award is \$573.69 and that claimant provided timely notice and made timely written claim.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated February 1, 1995, should be, and hereby is, modified to grant claimant ongoing medical treatment.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Robert E. Wright, and against the respondent, U.S.D. No. 259, a self-insured, for an occupational disease and last injurious exposure date of May 23, 1991, and based upon an average weekly wage of \$573.69, for 415 weeks of permanent partial disability compensation at the rate of \$57.37 per week or \$23,808.55 for a 15% permanent partial general body impairment of function.

As of April 30, 1996, there is due and owing claimant 257.71 weeks of permanent partial disability compensation at the rate of \$57.37 per week in the sum of \$14,784.82. The remaining weeks of 157.29 are to be paid at the rate of \$57.37 per week until fully paid or further order of the Director.

Claimant is entitled ongoing medical treatment consisting of prophylactic medications and periodic checkups and related procedures. Claimant may apply to the

Director for future medical benefits beyond the prophylactic medications and periodic checkups should the need arise.

The remaining orders of the Special Administrative Law Judge are hereby adopted by the Appeals Board and are incorporated herein by reference as if fully set forth to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS
Larry Shoaf, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director